No. 3375

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,

Appellant,

vs.

FONG GIN GEE,

Appellee.

APPELLANT'S BRIEF.

ANNETTE ABBOTT ADAMS,
United States Attorney,

BEN F. GEIS,
Asst. United States Attorney,
Attorneys for Appellant.

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BRIEF FOR THE GOVERNMENT.

Statement of the Case.

Fong Gin Gee, appellee, arrived at the port of San Francisco, California, on the S. S. "Korea Maru" January 14th, 1918, and made application to the Immigration authorities for admission to the United States, claiming to be the minor son of one Fong Cheung, who it was claimed, was a lawfully

domiciled Chinese merchant, a member of the firm of Man Hop and Company of Woodland, California.

The application of said Fong Gin Gee to enter the United States was denied by the Commissioner of Immigration for the port of San Francisco on the grounds "that the mercantile status and relationship is not established to my satisfaction."

From said Commissioner's excluding decision, an appeal was taken to the Secretary of Labor who, after a careful review of all the evidence, affirmed the said excluding decision "on the ground that the alleged father has not satisfactorily established that he is a merchant within the meaning of the law," and directed said Fong Gin Gee's deportation.

From said Secretary's excluding decision, a petition for writ of habeas corpus was filed (Tr. Rec. p. 3) and an order to show cause issued returnable July 13th, 1919 (Tr. Rec. p. 8). A demurrer to said petition was filed (Tr. Rec. 9) which was overruled and writ directed to issue returnable November 9th, 1918 (Tr. Rec. 10-12). An amended petition was filed November 23rd, 1919 (Tr. Rec. p. 13) and return thereto was filed November 30th, 1918 (Tr. Rec. p. 19) and traverse to said return filed December 5th, 1918 (Tr. Rec. p. 25).

The cause was submitted on briefs, and on January 13th, 1919, the following order discharging the said Fong Gin Gee from the custody of said Commissioner of Immigration was made and filed:

IN THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT, FOR THE NORTHERN DISTRICT OF CALIFORNIA, FIRST DIVISION.

No. 16,408.

In the Matter of FONG GIN GEE, on Habeas Corpus.

ORDER DISCHARGING FONG GIN GEE.

JOSEPH P. FALLON, Esq., Attorney for Petitioner,

MRS. ANNETTE ABBOTT ADAMS, United States District Attorney, and

C. F. TRUMUTOLO, Assistant United States Attorney, Attorneys for Respondent.

The question involved herein was decided by the Court upon demurrer. Nothing new is presented, and it is therefore ordered that the detained Fong Gin Gee be discharged.

January 13, 1919.

M. T. DOOLING,
United States District Judge.

It is from said order discharging the said Fong Gin Gee that this appeal is taken.

That the proceedings had were in accordance with the Chinese Exclusion Acts, and the rules applicable thereto, is not questioned, but unfairness during the proceedings, and abuse of discretion wherein a wrong decision was arrived at, is the contention of appellee, while the Government on the other hand, takes the opposite view. The issue then, is clean cut.

The Government also contends that the decision of the Secretary of Labor as made, is final, and release on habeas corpus should have been denied.

FINALITY OF DECISION.

Section 19 of the Act of February 5th, 1917, provides as follows:

> "In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, *the decision of the Secretary of Labor shall be final.*"

Under the well established rule of construction of statutes, there is but one road open to the construction of the clear and unambiguous meaning of the underscored words. There will be found no variance in its meaning as defined by lexicographers. To contend that a decision is final, and not final, is to utter a paradox. Finality of decision must be

lodged somewhere, and that it may be given by law, to executive, administrative and judicial officers, needs no citation of authorities. When the question is one not determinable by an exact science, and the decision of the person to whom the question is committed, is by law made final, without qualification of any kind, we contend that it is final, whether that finality is thus lodged in and with an executive, administrative, or judicial officer.

In *Yamataya vs. Fisher,* 189 U. S. 97; 47 L. Ed. 725, the Court says:

> "The constitutionality of the legislation in question, in its general aspect, is no longer open to discussion in this court. That Congress may exclude aliens of a particular race from the United States, prescribe the terms and conditions upon which certain classes of aliens may come to this country, establish regulations for sending out of the country such aliens as come here in violation of law, *and commit* the enforcement of such provisions, conditions and regulations, *exclusively to executive officers, without judicial intervention, are principles firmly established by the decisions of this Court.*"
>
> "Now it has been settled that the power to exclude or expel aliens belonged to the political department of the government, and that the order of an executive officer invested with the power to determine finally the facts upon which an alien's right to enter the country, or remain

in it depended, was 'due process of law' and no other tribunal unless expressly authorized to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency."

149 U. S. 698;
158 U. S. 538;
163 U. S. 228;
198 U. S. 263;
185 U. S. 296.

In 158 U. S., 536 *supra,* (39 L. Ed. 1082), the Court announces this doctrine:

"The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms or conditions upon which they may come to this country, and to have its declared policy in that regard enforced *exclusively* through executive officers without judicial intervention, is settled by our previous adjudications."

And in 158 U. S. 296; 48 L. Ed. 917, it is said:

"Congressional action has placed the final determination of the right of admission in executive officers, without judicial intervention, and this has been for many years the recognized and declared policy of the country."

In *Ekiu vs. U. S.,* 142 U. S. 660, the Court says:

"And Congress may, if it sees fit, as in the statutes in question, authorize the courts to investigate and ascertain the facts on which the right to land depends. But on the other hand, the final determination of those facts may be entrusted by Congress to executive officers, and in such cases, as in all others in which a statute gives a discretionary power to an officer, to be

> exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted.
>
> "It is not within the province of the judiciary to order that foreigners who have never been naturalized nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of the executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law."

In *Lou Wah Suey vs. Backus,* 225 U. S. 460; 56 L. Ed. 1167, which seems to be the latest case in point, the court, speaking through Mr. Justice Day, says:

> "A series of decisions in this court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings, it must be shown that the proceedings were *manifestly* unfair, that the action of the executive officers *was such as to prevent a fair investigation, or that there was a manifest abuse of the discretion committed to them by the statute.* In other cases the order of the

executive officers within the authority of the statute is final. *U. S. vs. Ju Toy,* 198 U. S. 253; 49 L. Ed. 1040; 25 Sup. Ct. Rep. 644; *Chin Yow vs. U. S.,* 208 U. S. 8, 52 L. Ed. 369; 28 Sup. Ct. Rep. 201; *Tang Tum vs. Edsell,* 223 U. S. 673."

Obviously the question is: 1st. Were the proceedings in the case at bar *manifestly unfair,* to wit, such as to prevent a fair investigation? and 2nd: Was there a *manifest* abuse of the discretion committed to them by statute?

AS TO UNFAIRNESS.

In this connection we fully believe that the Court will find, by an examination of the record, that every opportunity for the presentation of evidence in support of applicant's claim was given. There is no intimation that all the witnesses applicant could produce were not produced and given full opportunity to testify. In each instance the main witnesses were asked, "Have you anything further to state?" or, "Is there anything more you would like to state?" thus affording opportunity for unlimited statement, and in each instance the answer was "No."

The case having been closed on February 13th, 1918, it was *re-opened,* and additional evidence, to wit, affidavit of five witnesses permitted and considered on behalf of applicant. Then followed the

appeal to the Secretary of Labor. After considering the evidence presented by the record on appeal and an affirmance of the decision of the Commissioner of Immigration, the case was *again re-opened,* and further testimony taken and the cause was *again re-argued* by applicant's counsel and the former decision was again affirmed. With such a record we submit the contention of applicant "that Fong Gin Gee was refused or denied a fair hearing in good faith" is wholly without support. There was due process of law, no constitutional right of applicant denied him, nor in any way invaded.

II. DOES THE RECORD DISCLOSE MANIFEST ABUSE OF DISCRETION?

Discretion—when applied to judges or public functionaries— means a liberty, power or right conferred upon them by law, of acting officially in certain circumstances within the confines of right and justice, according to the dictates of their own conscience, uncontrolled by the judgment or conscience of others, and independent of narrow and unbending rules of positive law, to decide and act in accordance with what is fair and equitable on the peculiar circumstances of the case and as discerned by his personal wisdom and experience, guided by the spirit, principles and analogies of the law.

Abuse of discretion is defined by Corpus Juris as follows:

> "A discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence; a clearly erroneous conclusion and judgment—one that is clearly against the logic and effect of such facts as are presented in support of the application, against the reasonable and probable deductions to be drawn from the facts disclosed upon the hearing." 1 C. J. 372.

ABUSE JUSTIFYING INTERFERENCE.

> "The 'abuse of discretion,' to justify interference with the exercise of discretionary power, implies not merely error of judgment, but perversity of will, passion, prejudice, partiality or moral delinquency. 29 Ind. A. 395; 62 N. E. 107-111."
>
> 1 C. J. 372.
>
> "The exercise of an honest judgment, however erroneous it may appear to be, is not an abuse of discretion. Abuse of discretion and especially gross and palpable abuse of discretion, which are terms ordinarily employed to justify an interference with the exercise of discretionary power, implies not merely error of judgment, but perversity of will, passion, prejudice, partiality or moral delinquency. 29 N. Y. 418, 431."
>
> 1 C. J. 372.
>
> "Difference in judicial opinion is not synonymous with abuse of judicial discretion. 62 N. J. L. 380, 383."
>
> 1 C. J. 372.

Fong Cheung presented as one of his witnesses

to prove his status as a merchant, one J. L. Aronson, who was in the store almost every day.

J. L. ARONSON, (p. 7 Rec.)

> "Fong Cheung told me he gathered up chickens through the country. I never had any business or transaction with him in the store. I do not know whether he is engaged as a merchant or peddler. I never heard that Fong Cheung was a partner in the store."

When it is remembered that the testimony shows that this gathering up of chickens was the identical business of Fong Cheung for about *two years before* his alleged connection with the firm (Ex. A p. 17) and the failure of the witness to support the merchant status of Fong Cheung, for which he was produced, the testimony of this witness supports the decision of the Secretary of Labor, rather than tending to support applicant.

W. L. PROVOST (p. 8 Rec.)

> "I visit the store *once* a week to make purchases. Most of the time Fong Cheung is there. Have had transactions with him. In my observation he is a partner in this store. He *appears* to be the outside man; he goes to camps and has groceries and their baggage. I have never seen him peddling chickens. I have sold him some."

From this he concludes that Fong Cheung is a merchant, and not a laborer, although he says that he

would not be in a position to know whether he had performed other labor, unless it had been performed in his vicinity.

This witness visited the store but *once* a week, and then only to make purchases, and that Fong Cheung was there most of the time when he visited the store. This would indicate that some weeks he did not see him at all. If the status of a Chinese merchant can be built up and sustained upon that character of testimony, it would not be difficult to establish it for all Chinese. But even this testimony stands contradicted.

FONG BA testified (p. 18 Rec.): "W. L. Provost visited the store *almost every day.*"

This testimony was for the purpose of showing that Provost had much opportunity of knowing Fong Cheung's status to be that of a merchant.

W. L. PROVOST testified (p. 8 Rec.): "I visited the store *once a week.*"

Can it be said that such an occasional visit is sufficient knowledge on the part of the witness to even afford a guide to those who were to determine the status of Fong Cheung as a merchant?

In any event, these contradictions could, in the mind of the examining officers, destroy the testimony of both; at least, the officers would have the right to discredit both.

J. A. WOOD (p. 9 Rec.).

"Fong Cheung has been a partner in this store for a year and a half. Sometimes I visit the store every day, sometimes not so often. I have been selling these gentlemen chickens, and come and buy some of them. He gets orders from the country. Goes out gets them —brings some in here for the store and takes some to Sacramento. *He does not spend very much of his time in handling poultry.* Most of the time when I come he is in the store. I am in a position to testify that he is a bona fide merchant and not a laborer and not a peddler."

It sometimes happens that the very positiveness in which a witness testifies to the existence of material facts, condemns it.

We apprehend that it will not be disputed, at least not sucessfully, that the method of answering questions, the actions and demeanor of a witness, when testifying, is taken into account and considered by the Judge or official before whom the witness testifies. It is one of the tests applicable to all witnesses, in weighing the evidence given by them. This witness, it is plain, sought to minimize Fong Cheung's connection with, and the time he spent in, the poultry business, and have him in the store as much as possible, but in doing so, he also destroyed the force and effect his evidence might otherwise have had, but is Wood's statement in harmony with

the real facts or is he making wild and careless statements, to assist Fong Cheung.

Facts as to What Portion of Fong Cheung's Time Was Spent in Handling Poultry

J. A. WOOD, (p. 8 Rec.): "Not very much."	FONG CHEUNG, (p. 16 Rec.): "Average about *three* or *four days a week.*"

This is not only a contradiction of Wood but shows that from one-half to two-thirds of Fong Cheung's time is spent in handling chickens.

We also find in the record (p. 72) that in addition to the days he is away, Fong Ba testifies that Fong Cheung is gone in his chicken business "from *two to three nights a week.*" Q. What else does Fong Cheung do *besides handling chickens?* A. He delivers goods to different camps *for the firm.* Plainly then, his principal business is buying and selling chickens, and he is away from the store most of the time.

The record discloses that he was in the chicken business before he had any connection whatever with the store, and he continued it in practically the same way after his alleged connection with the firm. The occasional times he was or is in the store are merely incident to his continued poultry business,

and serves as an outward appearance, to the public, of his being a merchant, and lends some color upon which to secure white witnesses to testify to his merchant status when required, and necessary to land a son, but when analyzed in the light of the real facts and circumstances, it does not measure up to the test.

This question of *principal* business, when applied to one claiming to be a merchant, is well exemplified in *Lai Moy vs. U. S.* 66 Fed. 955. The facts disclosed that Lai Moy was a member of the firm of Lum Chong Bro. Co., dealers in dry goods, clothing and also manufacturers of pants and coats, etc. In his examination for admission as a merchant, upon his return from a visit to China, he was refused admission. The reasons for refusal were based on the following testimony:

"Q. Are you a clothes cutter?
A. Yes, I understand it.
Q. Was not that your principal business?
A. That and selling goods.
Q. Did you make clothes other than to cut them?
A. Sometimes.
Q. What do you mean by that?
A. Well, *if we were in a rush,* any one of us would take a hand on the sewing machine.
Q. What portion of your time were you cut-

ting and making clothing during the last year before you went to China?

A. I suppose *nearly equally divided.*"

In that case it is held, that the fact that Lai Moy, even when the firm of which he was a member *was in a rush,* worked *one-half* his time on garments they were actually selling at a *fixed* place of business, was a laborer.

Here we have Fong Cheung, who was a member of a firm dealing in general merchandise, devoting *three-fourths of his time* in going about the country buying chickens and selling them, as he says, to restaurants, markets and stores *in Sacramento,* the store being located in Woodland. True, he says that occasionally he would, if he got back to Woodland late, unload the chickens and then go to Sacramento in the morning, but he bought, as Fong Ba says, "anywhere on the ranches in the country" and sold in Sacramento. Fong Cheung was as much a peddler as was Lai Moy, a cutter or maker of clothing, and the result of the work Lai Moy performed was done in and sold at *their fixed place of business,* and it was apparently no more essential that Fong Cheung go out in the country and look for chickens, than for Lai Moy, when his firm was rushed, to work in securing the commodity they were selling. True there is a distinction, but the difference is

against Fong Cheung. Doubtless Lum Chong Bro. & Co. could have conducted their business without Lai Moy doing what he did, but the same is true of the work Fong Cheung performed. For it is a matter of common knowledge that poultry merchants *buy and sell* poultry at their *fixed* place of business.

In 184 Fed. 687, the Court says:

> "It was perhaps impossible to enumerate all the classes of occupation of the general nature of those mentioned, but the act clearly intends to make a distinction between merchants who buy and sell at a *fixed place of business* and those who sell goods which they have purchased to vend in *no* fixed place of business."

Section 2 of the Act of November 3, 1893, reads in part as follows:

> "Sec. 2. The words 'laborer' or 'laborers' wherever used in this act, or in the act to which this is an amendment, shall be construed to mean both skilled and unskilled manual laborers, including Chinese employed in mining, fishing, *huckstering, peddling,* laundrymen, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation.
>
> "The term 'merchant,' as employed herein and in the acts of which this is amendatory, shall have the following meaning and none other: A merchant is a person engaged in buying and selling merchandise, at *a fixed place of business,* which business is conducted in his

> name, and who during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant."

The statute places hucksters and peddlers in the category of laborers. Fong Cheung surely was a huckster or peddler for two years prior to the time he claims to have become interested in the firm of Man Hop and Company, and since that time he has been following identically the same line of business, to wit, buying and selling chickens. Conceding that he has an interest of $500 in the firm as claimed, that does not mean that he is a merchant within the meaning of the law, for to be a merchant he must be "engaged in *buying* and *selling* merchandise, at a *fixed* place of business." This the record shows, he does not do, but to the contrary, that he does all his buying and selling apart and away from the store,—the buying from the farmers throughout the surrounding country, and the selling to various stores and restaurants in Sacramento.

Contradictions as to Where Chickens are Sold.

WOOD testifies (p. 9 Rec.):

"Fong Cheung brings some in here *for the store* and takes some to Sacramento. I go to the store and buy some chickens of them."

FONG BA testifies (p. 73 Rec.):

"We sell *all* our chickens to Chinese and American *markets in Sacramento*. We sell to *restaurants*—markets. I don't know what res-

> taurants we sell to. Fong Cheung keeps track of all the different places. (p. 18 Rec.) Wood comes here *two* or *three* times a week to buy and sell chickens. Fong Cheung sells him chickens."
>
> FONG CHEUNG testifies (p. 16 Rec.): Q. What do you do with that poultry? A. We sell them to the stores in *Sacramento.* Q. Do you sell *all* of your chickens *in Sacramento?* A. *Yes.* Q. Do you ever sell *any* in Woodland? A. *No.*

Here we have not only clear and explicit contradiction, but positive declaration that Fong Cheung was buying and selling chickens, neither the buying nor the selling being at a *fixed* place of business.

Other Contradictions and Discrepancies.

FONG CHEUNG testifies (p. 16 Rec.):

"The firm transacts *no business except at the store.*

"The farmers come in to the store and sell their poultry." (p. 16 Rec.).

"We dispose of our poultry to Quong Foon, Nom Sing, Wing Hop and Fong Hing." (p. 75 Rec.).

FONG CHEUNG testifies (p. 15 Rec.):

"The firm has no interest in any ranch or ranches."

(p. 15 Rec.) The assets of the firm are:

Goods on hand, close to $1000
Debts due us a little over $1000
Close to $3000
Cash on hand $400 to $500
One machine, a little over $300
That is all. (p. 16 Rec.).

FONG CHEUNG testifies (p. 75 Rec.):

"Sometimes we have orders for chickens and no farmers come and ask us to buy. So I go out and hunt for some."

"I buy my poultry in the neighborhood of Woodland, Knights Landing and Black Station." (p. 75 Rec.).

FONG BA testifies:

"We sell to American and Chinese markets and restaurants."

FONG BA testifies (p. 19 Rec.):

"The firm owns one-half interest in a ranch."

The assets of the firm are:

Goods on hand about $700
Debts due the firm close to $3000
Cash on hand about $500
One machine, a little over $400
One-half interest in truck $500
That is all.

It is beyond belief that if Fong Cheung was a bona fide member of the firm he would be wholly ignorant and know nothing at all of the interest in the ranch, and particularly when the testimony of Fong Ba clearly shows that they have had four men working on this ranch for *seven or eight months.* (p. 19 Rec.).

In addition to what has been here shown, we call the Court's attention to the many discrepancies in the testimony pointed out by Immigrant Inspector Hannum on pages 22, 23, 24, 33, 34, 35, 36 and 37 of the record, and also the reference made by Hons. A. Caminetti and J. W. Abercrombie. (pp. 62, 63, 64, 65, 77, 78, 79, 80 and 88 of the record).

IS THERE ANY EVIDENCE TO SUPPORT THE FINDING OF THE SECRETARY OF LABOR? IF SO, THEN UNDER THE DECISIONS THE EXCLUDING DECISION OF THE SECRETARY OF LABOR SHOULD HAVE BEEN SUSTAINED BY THE DISTRICT COURT.

Fong Ba testifies, (p. 73 Rec.):

> "We sell *all* our chickens to Chinese and American markets in Sacramento. We sell to restaurants—markets. I don't know what restaurants we sell to. Fong Cheung keeps track of all the different places."

Fong Cheung testifies:

"The farmers come in the store and sell their poultry. I go out and look them over and buy them. We sell them to the stores in Sacramento. I take them to Sacramento by machine. I average 3 or 4 days a week. (Rec. p. 16).

"Q. Why should they (Henley's) say that you come there to inquire about poultry? A. Sometimes we have orders for chickens and no farmers come and asks us to buy chickens, so I have to go out and hunt for some.

Q. Do you sell *all* of your chickens in Sacramento?

A. Yes.

Q. Do you ever sell *any* in Woodland? A. No.

Q. Do you deliver them *all* in Sacramento in the machine?

A. Yes. (p. 75 Rec.).

The evidence clearly shows that none of the poultry is either bought or sold at the Woodland store but that Fong Cheung buys direct from the farmers in the surrounding country and sells them to various customers in Sacramento. When asked "Where do you buy your poultry?" Fong Cheung replied "In the neighborhood of Woodland, Knights Landing and Blacks Station." (p. 75 Rec.).

The record shows that Fong Cheung was for several years a buyer and peddler of chickens before he invested in the Woodland firm. "Q. What occupation did you follow before coming to Woodland? A. I went out through the country and bought poultry

and sold to the different stores. (p. 17 Rec.)." Surely it cannot be said that he is buying and selling goods at a fixed place of business.

This evidence, coupled with his lack of knowledge concerning the general business and assets of the firm, leads to but one conclusion, to wit, that he is not a merchant within the meaning of the Chinese Exclusion Acts, and that his claimed status as such, was colorably acquired for the sole purpose of bringing into the country his son, Fong Gin Gee.

This court, speaking through his Honor, Judge Morrow, in *White vs. Gregory,* 213 Fed. 768-770, says:

> "In reaching this conclusion the officers gave the aliens the hearing provided by the statute. This is as far as the court can go in examining such proceedings. It will not inquire into the sufficiency of probative facts, or consider the reasons for the conclusions reached by the officers."

Again, in *Lee Ah Yin vs. U. S.,* 116 Fed. 614, 615, this court speaking through his Honor, Judge Gilbert, held, that

> "There were inconsistencies in the evidence which may well have caused the commissioner and the court to doubt its truth, and there were circumstances which tended to impeach the evidence of the plaintiff in error. We cannot say that the judgment was clearly against the weight of the evidence."

From the many discrepancies and contradictions disclosed by the record, there is in fact little left upon which applicant could hope to sustain his claim, and on the other hand, there is much to lend support to the conclusion reached by the Immigrant Inspector, the Commissioner of Immigration, the Commissioner General and the Secretary of Labor. This is particularly forceful when it is remembered that the officer conducting the examinations are men trained in such investigations; the witnesses were before them, observed their manner and method of testifying, their demeanor on the stand, and all the many things that throw light upon and furnish a guide to courts, juries and all officers having jurisdiction to make investigations and hear evidence as to the real, as well as probable truth or falsity of the witnesses' statements. All this cannot be and is not disclosed by a cold record. When all these matters are considered, we respectfully submit that if there is any discretion committed to these officers at all, then the conclusion reached and the decision rendered, that Fong Cheung is not a bona fide merchant, doing business at a fixed place, should not have been disturbed, and particularly on habeas corpus.

Had the petition alleged facts showing that applicant was prevented from producing witnesses, or

being produced, were denied the right to give evidence to establish his right to enter the United States, and thereby denied a fair hearing, as in the case of *Chin Low vs. United States,* 208 U. S., page 8, then quite a different rule would obtain. In the case just referred to, petitioner alleged that he was prevented by the officials of the Commissioner from obtaining witnesses whose evidence would have proven his right of entry. The Court in that case says:

> "The question is, whether he is entitled to habeas corpus in such a case. If the petitioner was *not denied* a fair opportunity to produce the evidence that he desired, or a fair though summary hearing, the case can proceed no farther. These facts are the foundation of the jurisdiction of the District Court, if it has any jurisdiction at all. It must not be supposed that the mere allegation of the facts open the merits of the case, whether those facts are proved or not. And by way of caution, we may add that jurisdiction *would not be established* simply by proving that the Commissioner and the Department of Commerce and Labor did not accept certain sworn statements as true, even though no contrary or impeaching testimony was adduced. But supposing that it could be shown to the satisfaction of the District Judge that the petitioner had been allowed nothing but the semblance of a hearing, as we assume to be alleged, the question is, we repeat, whether habeas corpus may not be used to give the petitioner *the hearing that he has been de-*

> *nied.* But unless and until it is proved to the satisfaction of the judge that a hearing, properly so called, *was denied*, the merits of the case are not open."

We take this to be the true rule, and earnestly insist that the record clearly shows that applicant was not denied the opportunity of a fair hearing, but was granted an exceptionally liberal, full and fair hearing.

Petitioner's real contention is that the decision of the Secretary of Labor *is wrong.* We feel that it is unnecessary to again advert to the evidence disclosed in the record, and its discrepancies and contradictions. Under such conditions the sifting process and the discretion therein is committed to certain officers, and even if, in the exercise of their discretion, they arrive at a conclusion, which is susceptible of a different conclusion, it cannot be said to be wrong. In support of our contention in this, we call this Court's attention to the case of *Chin Low vs. U. S. supra,* wherein the Court employs this significant language: "The denial of a hearing *cannot be established by proving that the decision was wrong.*" In other words, a fair hearing does not depend upon the decision, but the decision, to be final, depends upon a fair hearing having been accorded applicant.

We are not unmindful of the District Court's decision on the demurrer in the case at bar, but in deference thereto, have gone into the voluminous record and pointed out matters that may have escaped the Court's notice, and have cited the principal authorities, although there are many others of the same import, and we feel that it is not the all-important matter or thing that this, or any one particular applicant, will or will not be permitted to land his son, but the decision of this Court herein will have a far greater significance, which needs no elucidation.

Respectfully submitted,

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Asst. United States Attorney,

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